



FIRST AMENDMENT LAW REVIEW

Volume 7 | Issue 2

Article 9

3-1-2009

Drawing the Line: *Buckley's* Impact on the Intersection of Contributions and the First Amendment

Stefanie Dresdner Lincoln

Follow this and additional works at: <http://scholarship.law.unc.edu/falr>

 Part of the [First Amendment Commons](http://scholarship.law.unc.edu/falr)

Recommended Citation

Stefanie D. Lincoln, *Drawing the Line: Buckley's Impact on the Intersection of Contributions and the First Amendment*, 7 FIRST AMEND. L. REV. 445 (2018).

Available at: <http://scholarship.law.unc.edu/falr/vol7/iss2/9>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in First Amendment Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

DRAWING THE LINE: *BUCKLEY*'S IMPACT ON THE INTERSECTION OF CONTRIBUTIONS AND THE FIRST AMENDMENT

*Stefanie Dresdner Lincoln**

[T]he only effective restraint upon executive policy and power . . . may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.¹

In an effort to thrive as an enlightened citizenry, we employ a variety of information-sharing tactics in our everyday lives that enhance our own knowledge and proliferate discussion to enhance the awareness of others. We educate ourselves and our fellow citizens in classrooms and newspapers, on street corners and doorsteps. We ask others to support our causes, to join in our beliefs, to change the world through policies—whether they involve school lunches or foreign aid. We organize together to fill in the gaps where our governmental policies are unable to handle the load. We contribute our time and our financial resources as a means of voicing support and affecting (or preventing) change in our society. These efforts to become an informed public, necessary to balancing the power of the government and preserving democracy, encompass an infinite number of interactions, not all of which deserve absolute protection under the First Amendment, and some of which fail to constitute speech at all.

The Supreme Court over the years has attempted to identify some of these boundaries of the First Amendment, assigning varying

* Juris Doctor Candidate, University of North Carolina School of Law, 2010. Thanks to Professor Bill Marshall for his thoughtful guidance.

1. N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

levels of scrutiny to different types of speech in an effort to strike an adequate balance between state interests and individual rights. Despite these endeavors, there still remains a great deal of ambiguity as to whether those who express and associate through the contribution of their financial resources deserve protection under the First Amendment and, if so, what degree of scrutiny is appropriate.

The question of when contributions constitute speech first arose in *Buckley v. Valeo*² in 1976, in which the Supreme Court shed some light on this issue in the arena of political campaign contributions. In finding heightened scrutiny appropriate for analyzing the contributions at issue in *Buckley*,³ the Supreme Court failed to explicitly define the boundaries of its holding as it might relate or extend to other types of contributions. Outside of this narrow situation, the degree of First Amendment protection owed to other types of contributions has not played a central role in constitutional law, leaving the unresolved question: when do contributions constitute speech?

Recent developments in national security law have given various circuits the opportunity to address this issue while determining the constitutionality of a statute prohibiting contributions to foreign terrorist organizations (“FTOs”).⁴ Although the prohibition against these particular contributions seems like a straightforward concept within national security efforts, the analysis becomes complicated when the organizations to which donations are prohibited also conduct humanitarian efforts and political advocacy, bringing into the mix the not-so-straightforward interests of the First Amendment. These cases provide a context which highlights the confusion among jurisdictions as to how far *Buckley*’s standard of scrutiny should extend, and at what point contributions become speech protected by the First Amendment. Although the contributions at issue relate to organizations engaging in terrorist activity, the contributing parties’ claims assert the more general rights under the First Amendment to associate and express support for humanitarian or political causes. The perspectives of circuits addressing these claims are thereby significant not only in the area of national security, but as precedent for addressing restrictions on contributions to

2. 424 U.S. 1 (1976) (per curiam).

3. *See id.* at 21.

4. *See* 18 U.S.C. § 2339B (2006); *see infra*, Parts I and II.

further any humanitarian causes or political advocacy.

The constitutional arguments of those who have contributed or seek to contribute to these prohibited organizations are plentiful, implicating the First and Fifth Amendments through vagueness, overbreadth, scienter, expression, and association issues.⁵ Amongst all of these claims rests the question of how to deal with these contributions insofar as they are protected by the First Amendment. Faced with a panoply of claims and little Supreme Court guidance, the courts have largely glossed over this question in one way or another, relying on the paramount national security interest of the government in order to dispose of the issue and move on to the next. The split which emerged among jurisdictions as to what standard of scrutiny is appropriate when considering the degree of protection deserved by these contributions has caused the lack of applicable precedent and adequate attention to become evermore apparent. These holdings side with one of two Supreme Court tests and draw varying lines as to when heightened or intermediate scrutiny should apply. Although the level of scrutiny was of little consequence to the holdings of the cases with which they dealt, the circuits resigned themselves to drastically different precedents which will apply in evaluating contributions in other contexts which do not involve the heavy hand of national security interests. Thus, with limited written reasoning or consideration, the circuits apparently would provide different levels of protection when faced with the First Amendment challenges to restrictions on different types of contributions. For example, a restriction on contributions made to organizations dedicated to relief in Darfur may be evaluated under strict scrutiny, while a restriction on contributions for cancer research may receive intermediate scrutiny or rational basis treatment. Although easily overlooked in the context of terrorism prevention, this inconsistency has broad implications and exposes a gap left by Supreme Court rulings.

This Note analyzes the issues raised by courts facing § 2339B constitutional questions and the split in choosing the appropriate level of scrutiny when those courts consider First Amendment problems with banning contributions to FTOs. Part I examines the statutory and

5. *See, e.g., Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (2d Cir. 2007) (addressing each of these types of claims in evaluating a challenge to the constitutionality of 18 U.S.C. § 2339B).

constitutional framework of the associational and expressive claims raised in these cases. Part II analyzes the approaches and rationales—or lack thereof—employed by five courts in different circuits attempting to fill in the gap left by the Supreme Court in analyzing the level of First Amendment protection appropriate for contributions violating § 2339B. This section highlights the inconsistent and sometimes arbitrary theories employed by these five illustrative cases resulting in very different conclusions as to the First Amendment value of the contributions at issue. Finally, Part III discusses the rationality of expanding protection to various types of contributions and proposes that a broader perspective of political expression and association is required to preserve the First Amendment interests of citizens.

PART I. CONSTITUTIONAL AND STATUTORY FRAMEWORK

A. The Constitutional Context: Buckley v. Valeo

The lines of cases addressing freedom of association⁶ and

6. The freedom of association is rooted in the idea that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The U.S. Supreme Court has recognized two distinct types of situations in which the freedom of association is protected. The first involves “intimate human relationships” protected as “a fundamental element of personal liberty.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) (upholding the Minnesota Human Rights Act prohibiting discrimination on the basis of sex against a challenge by an organization found in violation of the Act because its membership was limited to men). The additional meaning of the freedom of association, as expressed by the Court in *Roberts v. U. S. Jaycees*, establishes the “right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.” *Id.* at 618. The Court in *Roberts* also recognized that it has “long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Id.* at 622. Governmental attempts to restrict this right of expressive association must be analyzed under strict scrutiny, requiring “compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational

protection of symbolic or expressive conduct⁷ collide in the area of donations as expression and as a means of association. Various circuits addressing whether the ban on contributions to FTOs under § 2339B violates the First Amendment freedoms of association and expression reach the same conclusion that the provision is constitutional. Beneath the consistent holdings, however, courts employ inconsistent reasoning, relying on varying standards and cherry picking from the reasoning of other circuits and Supreme Court cases to create unclear standards for

freedoms.” *Id.* at 623.

7. The right to free expression reaches beyond the spoken and written word into at least some forms of conduct. *See, e.g.,* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that the wearing of black armbands to express objection to the Vietnam War warranted First Amendment protection). The Court in *United States v. O’Brien*, 391 U.S. 367 (1968), established the longstanding test to be applied to incidental restrictions on First Amendment rights resulting from regulation of conduct. In *O’Brien*, the defendant challenged the constitutionality of the law under which he was prosecuted, which banned the destruction of a draft card, by claiming that his burning of the draft card was a “demonstration against the war and against the draft.” *Id.* at 376. Upholding the law, the Court in *O’Brien* held that, where a regulation is within the constitutional power of the government, that regulation is justified “if it furthers an important or substantial governmental interest[,] if the governmental interest is unrelated to the suppression of free expression[,] and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.* at 377. Although the Court in *O’Brien* supplied the current standard for incidental restrictions on First Amendment freedoms by acts regulating conduct, the Court did not supply a clear answer as to what constituted expressive conduct warranting application of the *O’Brien* test. In fact, the Court never actually concluded whether or not the burning of a draft card at issue constituted such conduct, but instead assumed *arguendo* “that the alleged communicative element in O’Brien’s conduct [was] sufficient to bring into play the First Amendment.” *Id.* at 376.

The Court in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (“FAIR”), 547 U.S. 47 (2006), helped to clarify standards of what constitutes protected conduct warranting application of *O’Brien*. The plaintiffs in *FAIR* challenged the constitutionality of a law prohibiting law schools from restricting military recruiters’ access to their campuses, claiming that exclusionary practice was an expression of disagreement with certain military policies. *Id.* at 65-66. The Court in *FAIR* limited conduct deserving of “First Amendment protection only to conduct that is *inherently* expressive.” *Id.* at 66 (emphasis added). The Court concluded that conduct which requires explanation in order for an observer to understand its expressive value, and which otherwise would not be recognized as speech, is not deserving of First Amendment protection under *O’Brien*. *Id.*

evaluating the constitutionality of restrictions on non-campaign contributions.⁸

Though the Supreme Court has provided little guidance in discerning the standard to be applied when evaluating the constitutionality of restrictions on financial contributions, it did, as previously mentioned, speak directly to the issue in the context of campaign contributions in *Buckley*. In order to fully understand the reasoning of the various circuits addressing the constitutionality of § 2339B, it is necessary to look first at the standard established in *Buckley*.

The plaintiffs in *Buckley* challenged the constitutionality of the Federal Election Campaign Act of 1971, which, among other regulations, set campaign contribution and expenditure limits.⁹ In addressing the constitutionality of contribution and expenditure limitations, the Court rejected as inappropriate the *O'Brien* intermediate scrutiny analysis applied by the Court of Appeals for the D.C. Circuit, finding that "[t]he expenditure of money simply cannot be equated with such conduct as destruction of a draft card."¹⁰

Although the Court distinguished expenditures from contributions, finding that expenditure limitations have a greater impact on free expression, it acknowledged that "[a] contribution serves as a general expression of support for the candidate and his views."¹¹ The Court held:

A limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's

8. See *infra*, Part II.

9. *Buckley v. Valeo*, 424 U.S. 1, 6-7 (1976) (per curiam).

10. *Id.* at 16. The Court also noted that, even if the use of money in *Buckley* were categorized as conduct, the restrictions at issue would fail the *O'Brien* test because "the governmental interests advanced in support of the Act involve[d] 'suppressing communication.'" *Id.* at 17. The Court also rejected the argument that the restrictions fell in line with a number of cases upholding time, place, and manner restrictions, finding that the contribution and expenditure limitations imposed "direct quantity restrictions on political communication and association . . ." *Id.* at 18.

11. *Id.* at 21.

freedom to discuss candidates and issues.¹²

The Court also found that contribution limitations “impinge[d] on protected associational freedoms.”¹³ The Court reasoned that “[m]aking a contribution . . . serves to affiliate a person with a candidate.”¹⁴ In the midst of a convoluted discussion of contributions,¹⁵ expenditures, expression, and association, the Court in *Buckley* established a standard to deal with such limitations, holding that “[e]ven a ‘significant interference with protected rights of political association’ may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational [and expressive] freedoms.”¹⁶ In applying this heightened scrutiny to the limitations in *Buckley*, the Court found a sufficiently important government interest in limiting the “actuality and appearance of corruption resulting from large individual financial contributions.”¹⁷

Throughout its analysis, the Court did not identify the scope of its holding, leaving open the question of *Buckley*’s effect on other types of contributions. The *Buckley* opinion provides language that lower

12. *Id.*

13. *Id.* at 22.

14. *Id.*

15. See William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 350-51 (Winter 2000) (outlining reasons why critics of *Buckley* “agree that the Court made an incoherent distinction between contributions and expenditures”).

16. *Buckley*, 424 U.S. at 25 (internal quotations removed) (citing *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975)). The Supreme Court in *Nixon v. Shrink*, 528 U.S. 377 (2000), clarified the standard as applying to both associational and expressive freedoms:

While we did not attempt to parse distinctions between the speech and association standards of scrutiny for contribution limits, we did make it clear that those restrictions bore more heavily on the associational right than on freedom to speak. We consequently proceeded on the understanding that a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well, and we held the standard satisfied by the contribution limits under review.

Id. at 388 (internal citation omitted).

17. *Buckley*, 424 U.S. at 26.

courts have used to support both sides of the debate (in some unexpected contexts). As previously mentioned, the question has been raised on several occasions in challenging the constitutionality of a ban on contributions to any foreign terrorist organization, contained in § 2339B of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).¹⁸

B. Terrorism Prevention Legislation

In April 1996, Congress passed the AEDPA to prevent terrorist organizations from acquiring funds “through affiliated groups or individuals” functioning as a front for these organizations.¹⁹ Section 2339B(a)(1) of the Act provides in relevant part:

Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act) or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act).²⁰

Congress defined “material support or resources” as:

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more

18. Pub. L. No. 104-132, § 301(6), 110 Stat. 1247 (1996).

19. *Id.*

20. 18 U.S.C. § 2339B(a)(1) (2006).

individuals who may be or include oneself), and transportation, except medicine or religious materials.²¹

The current scienter requirement in § 2339B calling for only knowledge of the organization's status, as opposed to specific intent to further the organization's illegal aims, was clarified in amendments contained in the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"). These amendments followed a split in statutory interpretation among several circuits—more specifically, an opinion by a district court in the Eleventh Circuit interpreting the statute as requiring specific intent and finding that such a requirement is necessary in order for the statute to pass constitutional muster.²² Thus, if a contributor intended only to give funds to the charitable or political advocacy activities of an organization designated as an FTO, the contributor is materially supporting terrorism so long as he is aware of the organization's status or illegal activities, regardless of his actual intentions.

In 8 U.S.C. § 1189, Congress authorized the Secretary of State to designate as an FTO any organization the Secretary finds to be a foreign organization engaging in terrorist activity or terrorism (or which "retains the capability and intent to engage in terrorist activity or terrorism"), and whose terrorist activities the Secretary finds to threaten the national security of the United States or U.S. nationals.²³ The Secretary is not required under this section to notify either the designated organization or its donors personally. Although the Secretary is required to notify and provide reasoning to the leaders and relevant committee members of the House of Representatives and Senate, the only public notice required is publication in the Federal Register.²⁴ Once an organization's designation as an FTO is published in the Federal Register, any material support, as defined in § 2339A, violates § 2339B.²⁵

The broad reach of this statute has precipitated a variety of First

21. 18 U.S.C. §2339A(b)(1) (2006).

22. *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1341 (M.D. Fla. 2004).

23. 8 U.S.C. § 1189(a)(1) (2006).

24. 8 U.S.C. § 1189(a)(2)(i) (2006).

25. 8 U.S.C. § 1189(a)(2)(ii) (2006).

Amendment challenges.²⁶ Although the Supreme Court has never addressed the constitutionality of § 2339B, several courts have addressed the claims that the statute infringes on rights of association and expression and have consistently reached the same result that § 2339B is constitutional.²⁷ A closer look at the reasoning among jurisdictions, however, reveals inconsistencies. Before determining the proper standard of analysis for contributions violating § 2339B, it is necessary first to look at the divergent approaches taken by various circuits.

II. INCONSISTENT TREATMENT: FIVE ILLUSTRATIVE CASES

A. *Humanitarian I*

The Ninth Circuit's decision in *Humanitarian Law Project v. Reno* (*Humanitarian I*) provides a heavily cited decision on the applicable standard for evaluating § 2339 contributions. The plaintiffs in *Humanitarian I* wished to contribute funds to the Kurdistan Workers' Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"), organizations listed as FTOs, and sought injunctive relief barring enforcement of the AEDPA.²⁸ Among several First Amendment claims, plaintiffs argued that § 2339B "infringe[d] their associational rights under the First Amendment," as their support was meant to aid humanitarian and political activities of the organizations.²⁹ The court rejected the argument that *Buckley* should apply to the contributions, limiting the application of *Buckley*'s heightened scrutiny to "organizations whose overwhelming function [is] political advocacy."³⁰ The court in *Humanitarian I* held instead that contributions to organizations which do not fall under *Buckley* constitute only expressive conduct regulated under *O'Brien*.³¹ The court asserted that "[t]he government may . . . regulate contributions to organizations that engage

26. See *supra* text accompanying note 4.

27. See, e.g., *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1343 (M.D. Fla. 2004); *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000).

28. *Id.* at 1133.

29. *Id.*

30. *Id.* at 1134.

31. *Id.* at 1135.

in lawful—but non-speech related—activities.”³²

The Ninth Circuit’s reasoning in limiting *Buckley* in this manner, however, was largely unclear and unsupported. As an initial matter, the court did not provide reasoning or support for its finding that whether a contribution deserves higher scrutiny than *O’Brien*’s intermediate scrutiny depends upon the degree to which that organization practices political advocacy. Assuming, *arguendo*, that the court was correct in limiting the scope of *Buckley* to “organizations whose overwhelming function [is] political advocacy,”³³ the court neither defined the vague term “political advocacy” nor established criteria to identify activities that would fall within this category. The court also provided no guidance with respect to whether “political advocacy” encompasses legislative advocacy or whether it only includes supporting a candidate in a governmental election campaign.

Furthermore, the opinion offered only a brief footnote addressing the organizations to which the plaintiffs wished to contribute in the context of the discussion of limiting *Buckley* to political advocacy groups. This peculiar note characterized the central issue as “the right of Americans to express their association with foreign political groups through donations.”³⁴ Focusing on the aims of the organizations to affect change in a foreign government, the court asserted that “the political advocacy of the PKK and LTTE directed toward their own government is not protected by our First Amendment.”³⁵

As an initial matter, the court’s mischaracterization of the issue as to whether the *organization* was entitled to First Amendment protection ignores the issue of the rights of *donors* as citizens or those deserving of constitutional protection. It is not the First Amendment rights of the organization, but the rights of the donors to associate and express support for an idea, that is the concern of *Buckley* and its progeny.

Moreover, the court appeared to be grasping at straws in effort to support its exclusion of the PKK and LTTE from the category of political advocacy groups deserving *Buckley* protection. Perhaps to avoid

32. *Id.*

33. *Id.* at 1134.

34. *Id.* at 1134 n.1 (citation omitted).

35. *Id.*

assessing the organizations at issue in *Humanitarian I* using its own standard of "overwhelming political advocacy," the court cited as its only authority in this footnote *United States v. Verdugo-Urquidez*,³⁶ describing the latter as a case in which the Court "refus[ed] to extend constitutional protection to [a] Mexican citizen."³⁷ The facts of *Verdugo-Urquidez*, however, are hardly similar to those in *Humanitarian I*. The Court in *Verdugo-Urquidez* held that the Fourth Amendment did not apply to a search and seizure of property located in Mexico and owned by a Mexican citizen and resident "with no voluntary attachment to the United States."³⁸ Dealing only with a foreign citizen with no voluntary connection to the United States and activities taking place solely outside the United States, there is, at best, only the slightest of connections between this Fourth Amendment case and the First Amendment claims in *Humanitarian I*. The *Humanitarian I* court's disingenuous use of *Verdugo-Urquidez* provided little by way of support for its mischaracterization of the issue of the protection deserved by the PKK and LTTE, and seems entirely irrelevant to the issue of the degree of First Amendment protection owed to the hopeful donors to these organizations.

As quickly as the Ninth Circuit distinguished the contributions at issue from those in *Buckley*, it just as quickly relied on *Young v. New York City Transit Authority*,³⁹ where the Second Circuit upheld a ban on panhandling in the subways, in support of its finding that the government may regulate the plaintiffs' desired contributions in *Humanitarian I* despite any expressive component achieved through the act of contribution.⁴⁰ This reliance on *Young* is noteworthy for several reasons. The immediate transition from rejecting *Buckley*'s application to relying on *Young* seems to indicate that the court found contributions to non-political advocacy organizations (whatever that term is meant to encompass) more similar to begging in New York subways than to political campaign contributions. The connection drawn by the Ninth

36. 494 U.S. 259 (1990).

37. *Humanitarian I*, 205 F.3d at 1134 n.1.

38. *Verdugo-Urquidez*, 494 U.S. at 274-75.

39. 903 F.2d 146, 157 (2nd Cir. 1990) (upholding a ban on panhandling in New York City subways after applying intermediate scrutiny).

40. *Humanitarian I*, 205 F.3d at 1135.

Circuit between contributions and panhandling appears tenuous not only in light of its juxtaposition with campaign contributions, but also as a result of *Young*'s focus on the speech value of solicitations as opposed to contributions.

Additionally, the court in *Young* distinguished "begging [by individuals from] . . . solicitation by organized charities."⁴¹ Significant to the Second Circuit's reasoning is its recognition that, "[w]hile organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good."⁴² This clear distinction further weakens the substantiality of the Ninth Circuit's reliance on *Young*, as the organizations at issue in *Humanitarian I* would more likely fall into the Second Circuit's category of an organized charity than begging or panhandling. In choosing to apply *O'Brien* and relying on *Young*, the question remains whether the Ninth Circuit departed from the Supreme Court's finding that "[t]he expenditure of money simply cannot be equated with such conduct as destruction of a draft card."⁴³ Nevertheless, the Ninth Circuit's findings in *Humanitarian I* have influenced the decisions of several other circuits facing First Amendment challenges to § 2339B.

B. Hammoud and Warsame

In *United States v. Hammoud*,⁴⁴ the Fourth Circuit addressed the standard applicable to contributions to Hizballah that violated § 2339B in addressing the First Amendment claims of a Lebanese citizen who had gained permanent resident status by marrying a United States citizen.⁴⁵ The *Hammoud* court, in a somewhat dismissive footnote, rejected the

41. *Young*, 903 F.2d at 155-56.

42. *Id.* at 156.

43. *Buckley v. Valeo*, 424 U.S. 1, 16 (1975).

44. 381 F.3d 316 (4th Cir. 2004). Although there is subsequent history regarding this case, it affected only the sentencing portions of the decision, and not the substantive decision. See *United States v. Hammoud*, 405 F.3d 1034 (4th Cir. 2005).

45. *Hammoud*, 381 F.3d at 325.

plaintiff's argument that *Buckley* should apply in evaluating the constitutionality of the contribution ban.⁴⁶ It peremptorily stated that "Hizballah is not a political advocacy group" and that "while providing monetary support to Hizballah may have an expressive component, it is not the equivalent of pure political speech."⁴⁷ The court gave no further explanation either as to why Hizballah is not a political advocacy group or how the court came to the conclusion that its status as a non-political advocacy group precluded *Buckley* from applying. The court merely cited *Humanitarian I* to support its decision, failing to fully flesh out its First Amendment basis.⁴⁸

A Minnesota District Court in the Eighth Circuit built upon this trend of conclusory statements supported by similarly dismissive findings from other circuits in *United States v. Warsame*.⁴⁹ Plaintiff, in a motion to dismiss two counts of an indictment against him, argued that *Buckley* required that strict scrutiny apply in evaluating the constitutionality of § 2339B under the First Amendment as applied to contributions to al Qaeda.⁵⁰ In rejecting this argument the court, after summarizing *Buckley*, stated the premise from *Humanitarian I* that "such contributions are deemed protected political speech only when made to an organization 'whose overwhelming function [is] political advocacy.'"⁵¹

The court in *Warsame* gave no further explanation as to why *Buckley* should be limited to such organizations, but instead relied only on *Humanitarian I*'s conclusory statement to exclude *Buckley* from applying to non-political advocacy organizations. Moreover, the court, like those in *Humanitarian I* and *Hammoud*, failed to identify a set of criteria which would aid in determining whether or not an entity qualifies as a political advocacy organization. In fact, the court merely stated that "[a] Qaeda is not a political advocacy group," citing only *Hammoud*'s

46. *Id.* at 328 n.3.

47. *Id.*

48. *Id.*

49. 537 F. Supp. 2d 1005 (D. Minn. 2008).

50. *Id.* at 1015.

51. *Id.* (alteration in original) (quoting *Humanitarian Law Project v. Reno*, 205 F.3d 1330, 1134-35 (9th Cir. 2000)).

treatment of Hizballah as support.⁵² Thus, not only did the court neglect to analyze the organization at issue to establish reasoning as to its categorization, but it cited another circuit's conclusory finding about a different organization for support.

C. Boim

The Seventh Circuit in *Boim v. Quranic Literacy Institute and Holy Land Foundation for Relief and Development*⁵³ offered a different approach to First Amendment analysis of § 2339B. In *Boim*, parents of a terrorism victim brought a civil suit against two organizations which the plaintiffs claimed supported the FTO Hamas, and therefore aided in carrying out Hamas' attack on the victim.⁵⁴ The suit was brought under 18 U.S.C. § 2333, which allows a United States national injured by international terrorism to bring a civil suit for damages.⁵⁵ Although the terrorist act was not committed directly by the defendants, but instead by Hamas, plaintiffs offered as one theory of civil liability that a criminal violation under § 2339A and B gave rise to a civil claim under 18 U.S.C. § 2333.⁵⁶ In other words, the plaintiffs argued that if the defendants, as plaintiffs alleged, donated to Hamas in violation of § 2339B, they may also be civilly liable to plaintiffs under § 2333. In response, the defendant organizations argued that "to the extent that [the plaintiff's] claim is founded on a violation of § 2339B, it cannot withstand First Amendment scrutiny because § 2339B fails to account for the . . . associational rights of the contributors who donate money for

52. *Id.* at 1015 (citing *Hammoud*, 381 F.3d at 328 n.3).

53. 291 F.3d 1000 (7th Cir. 2002).

54. *Id.* at 1004.

55. 18 U.S.C. § 2333(a) (2006). Section 2333 provides in relevant part:

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefore in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

Id.

56. *Boim*, 291 F.3d at 1004-1005.

humanitarian purposes.”⁵⁷ Thus the court was forced to deal with the First Amendment claim against § 2339 in order to resolve the issue of civil liability.

Before discussing and applying *Buckley*, the court in *Boim* asserted, citing *Humanitarian I*, that “[c]onduct giving rise to liability under § 2339B, of course, does not implicate associational or speech rights.”⁵⁸ The court nevertheless discussed *Buckley* shortly thereafter, addressing the expressive and associational rights implicated by contribution restrictions.⁵⁹ In applying *Buckley* and analyzing the importance of the government’s interest as part of the test, the court found “paramount” the government’s interest in preventing terrorism, and also noted that this interest was “unrelated to suppressing free expression.”⁶⁰ The court also addressed themes from the *O’Brien* test, again citing *Humanitarian I*.⁶¹ Thus, although the Seventh Circuit in *Boim* found that *Buckley* provided the applicable test for evaluating the constitutionality of § 2339B, its analysis in holding that § 2339B was constitutional included a peculiar combination of ideas from *Buckley*, *Humanitarian I* and *O’Brien* which resulted in mixed signals.

In another peculiar move, the *Boim* court not only applied *Buckley* without hesitation or contemplation of whether *O’Brien* would be more appropriate, but also applied *Buckley* in addressing the defendants’ claim that a ban on contributions under § 2339B “fail[ed] to account for . . . the associational rights of the contributors who donate money for *humanitarian* purposes.”⁶² The decision thus ostensibly interpreted *Buckley* as applying to contributions for the purpose of associating with humanitarian causes, and not just organizations engaging overwhelmingly in political advocacy as identified by the court in *Humanitarian I*. The Seventh Circuit in *Boim*, in an effort to resolve and reject the defendants’ First Amendment argument, seemingly ignored the disjoint between the *Humanitarian I* court’s view that

57. *Id.* at 1021.

58. *Id.* at 1026 (citing *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000)).

59. *Id.* at 1026-27.

60. *Id.* at 1027.

61. *Id.*

62. *Id.* at 1021 (emphasis added).

contributions violating § 2339B require *O'Brien* intermediate scrutiny and its own application of *Buckley* after finding that no speech or associational rights are implicated by § 2339B. What is left is an unclear standard that awkwardly combines other jurisdictions' and Supreme Court precedent.

D. Al-Arian

In the Eleventh Circuit, the U.S. District Court for the Middle District of Florida in *United States v. Al-Arian*⁶³ expressly declined to follow *Humanitarian I* in determining what test to apply to a plaintiff's challenge that § 2339B infringed First Amendment rights of association and expression.⁶⁴ The court instead embraced *Buckley* as the appropriate standard, agreeing with the *Boim* court.⁶⁵ In a footnote further explaining its decision to apply *Buckley*, the court in *Al-Arian* noted:

This Court disagrees with the Ninth Circuit that intermediate scrutiny under *United States v. O'Brien* applies to whether a prohibition on fundraising and contribution is constitutional under the First Amendment The Ninth Circuit opinion provides no reason on why *Buckley*'s contribution analysis should not apply to other forms of contributions. This Court sees no basis for a difference in constitutional analysis between political contributions and other forms of contributions. Both have a speech and an associational component.⁶⁶

The court in *Al-Arian* thus not only rejected the line drawn by the Ninth Circuit including only contributions to organizations whose overwhelming function is political advocacy, but appears to include all contributions as requiring *Buckley*'s higher scrutiny. Although the court noted that "as a practical matter, it may be easier for the government to regulate contributions to foreign groups because of the strength of the

63. 308 F. Supp. 2d 1322 (M.D. Fla. 2004).

64. *Id.* at 1343.

65. *Id.* at 1342-43.

66. *Id.* at 1342-43 n.41.

governmental interests at stake in cases similar to this one,”⁶⁷ it declined to define any limits to the scope of *Buckley*.

III. ANALYSIS

As a practical matter, in each of these § 2339B cases, the choice between *Buckley* and *O’Brien* does not affect the result, as the courts fall back on the paramount governmental interest in national security, and the restrictions on contributions survive both the intermediate and heightened scrutiny analyses.⁶⁸ However, the inconsistency among jurisdictions reinforces the need for a framework that distinguishes between those contributions deserving heightened scrutiny under *Buckley* and those receiving only the protection of intermediate scrutiny under *O’Brien*. Thus, the question emerges from the inconsistent and inadequate reasoning of the courts in the cases above: where should the courts draw the line?

Within the realm of financial contributions⁶⁹ there are several subcategories. As a starting point at one end of this spectrum lie campaign contributions, or contributions to organizations engaging in express political or electoral advocacy, described as “pointed exhortations to vote for particular persons.”⁷⁰ One step away from entities whose purpose is to defeat or elect a specific candidate, but still within the realm of political speech, fall contributions to organizations practicing “issue advocacy.”⁷¹ These organizations generally focus on legislative issues, taking a position on an issue and urging the public to

67. *Id.*

68. There is, however, additional disagreement among the circuits concerning the tailoring of restrictions to the ends sought. This separate debate turns on the existence and potential need for a scienter requirement in the provision of material support; that is, whether specific intent to further the illegal terrorist aims of the organization is required, as opposed to mere knowledge of the organization’s status. This topic, however, falls outside the scope of this note.

69. I draw a similar line here to that drawn by the Court in *Young, supra*, in distinguishing donations to organizations from giving money to a person. In *Young*, the distinction applied to solicitations, but the principles remain largely the same, and so the framework discussed here applies at a minimum to organizations of some form.

70. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986).

71. *FEC v. Wis. Right to Life*, 127 S.Ct. 2652, 2659 (2007).

adopt the same view and to contact public officials regarding the issue.⁷² These two types of organizations, in practicing political speech, operate well within the bounds of the electoral and legislative systems and would very likely fall easily within *Buckley*'s protection.

Falling further away from organizations engaging in explicit political speech are contributions to educational and charitable organizations. Nonprofit educational organizations may focus on a variety of social issues without engaging directly in the political process.⁷³ Contributions to a charitable or religious organization formed to address social welfare or humanitarian needs rest near the far end of the spectrum from express political or electoral advocacy, surpassed only by contributions to commercial organizations or those organizations engaging primarily in commercial activity. These latter contributions might be characterized as payments constituting "private economic decisions" in exchange for a good or service, where that good or service was the primary purpose for the payment.⁷⁴

Despite the mixed signals from the High Court and division among the lower courts as to the proper standard for analyzing First Amendment challenges to § 2339B, on close analysis, the Supreme Court does provide guidance as to when a contribution warrants constitutional protection. In addressing this question, it is helpful to identify what contributions would most easily be excluded from *Buckley*'s reach. As a general First Amendment issue, the Supreme Court has recognized that "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."⁷⁵ If the First Amendment value of a contribution lies in its function as an expression of support for the views of the recipient, and the message of the recipient falls within the lesser category of commercial speech, then the contributions would likely not fall within the heightened protection of

72. *Id.* at 2667.

73. In fact, tax exempt 501(c)(3) organizations may not engage in campaign activities or legislative advocacy efforts. 26 U.S.C. § 501(c)(3) (2006).

74. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

75. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980) (citing *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456-57 (1978)).

Buckley. The Court in *Village of Schaumburg v. Citizens for a Better Environment*,⁷⁶ while discussing the First Amendment characteristics of charitable solicitations, distinguished them from "purely commercial speech."⁷⁷ Although the Court noted that the case law excluding commercial speech from any First Amendment protection was no longer good law, it focused its holding on the First Amendment protection afforded to charitable donations, emphasizing the non-commercial First Amendment speech involved.⁷⁸

The stance taken by the courts in *Boim* and *Al-Arian*, setting no boundaries to the application of heightened scrutiny under *Buckley*, may lead to absurd results. Allowing all contributions to warrant the same type of associational and expressive protection under the First Amendment as the express political advocacy in *Buckley* seems to move against the grain of the *O'Brien* Court's concern with creating "an apparently limitless variety of conduct" with First Amendment strict scrutiny protection.⁷⁹ A narrow reading of *Buckley* might apply the heightened standard only to campaigns for federal elections, as these were the types of contributions directly addressed by the Court in that case. There is, however, support for the proposition that *Buckley* should have broader application in analyzing contribution restrictions of various types. The Court's opinion in *Buckley* provides evidence of a more general scope of protected contributions than merely campaign involvement. In finding that the contribution and expenditure limitations at issue in *Buckley* "operate in an area of the most fundamental First Amendment activities," the Court immediately qualified this statement by noting that the "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."⁸⁰ The Court's mention of public issues leaves us again with a vague First Amendment term, potentially encompassing a wide variety of social and political issues.

Charitable contributions provide an awkward fit in defining the scope of *Buckley*. The Supreme Court in *Schaumburg* addressed the

76. 444 U.S. 620 (1980).

77. *Id.* at 632.

78. *Id.*

79. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

80. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (emphasis added).

constitutionality of restrictions on solicitations for contributions by charitable, non-commercial organizations, finding that such solicitations were protected by the First Amendment.⁸¹ The Court invalidated an ordinance prohibiting solicitations in which the organization could not show that at least seventy-five per cent of the proceeds went directly to the organization's charitable purpose.⁸² In addressing the First Amendment concerns raised by restrictions on charitable solicitations, the court held:

[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.⁸³

This explanation of the value of solicitations under the First Amendment raises the concern that, in the event of a total ban on contributions to a particular organization or group of organizations, the availability and benefit of solicitation is lost as well. Because *Schaumburg* pertains to charitable organizations with seemingly infinite purposes, ranging from public health and welfare services to legal defense and political advocacy, an absolute ban on contributions to any of these organizations would necessarily risk causing the very evil the Supreme Court was trying to prevent in *Schaumburg*: the blocking of the dissemination of advocacy and ideas that flow from solicitation.⁸⁴ The

81. *Village of Schaumburg*, 444 U.S. at 632.

82. *Id.* at 624 n.4.

83. *Id.* at 632.

84. *Id.*

high First Amendment value of solicitation thus provides reason to believe that restrictions on responsive contributions deserve protection as well.

In addition to protecting contributions merely to preserve solicitations, there is further evidence that these contributions deserve protection on their own merits as speech in response to charitable solicitations. The Court nodded in the direction of expanding *Buckley*'s contribution holding in *Cornelius v. NAACP Legal Defense and Education Fund*.⁸⁵ In *Cornelius*, advocacy organizations challenged the federal government's denial of their participation in the Combined Federal Campaign ("CFC"), a charity drive created by the federal government in which federal employees contributed to participating charitable organizations after receiving literature on these organizations distributed to them during the workday.⁸⁶ The plaintiff organizations claimed that the denial of participation infringed their First Amendment right to charitable solicitation.⁸⁷ In supporting its holding that solicitation within the CFC did deserve First Amendment protection under *Schaumburg*, the Court, citing *Buckley*, noted that "an employee's contribution in response to a request for funds functions as a general expression of support for the recipient and its views."⁸⁸ The Court thus applied themes from *Buckley* outside the context of express or issue advocacy, but did not explicitly reach the question of whether these charitable or other advocacy contributions would warrant the heightened scrutiny standard from *Buckley*, as it was not at issue in the case.

Despite the variety of factors pointing to an expanded applicability of heightened scrutiny, one cannot ignore the thirty-six occasions in which the Court in *Buckley* used one of the following terms: political communication, political expression, political speech or political association.⁸⁹ The Court's choice of language, coupled with the lack of Supreme Court precedent actually applying *Buckley* in a different context, provides reason to rein in the reach of *Buckley* to political advocacy organizations, as *Humanitarian I* suggested. This, however,

85. 473 U.S. 788 (1985).

86. *Id.* at 792-93.

87. *Id.* at 795.

88. *Id.* at 799 (citing *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)).

89. *See Buckley*, 424 U.S. at *passim*.

does not end the inquiry, as *Humanitarian I* and those circuits following its lead did not define political advocacy, nor did they apply any reasoning to the organizations at issue in each of those cases.

Perhaps a closer look at the purposes of the First Amendment and the philosophies behind *Schaumburg* reveals the need for a broader definition of political advocacy encompassing contributions in response to charitable solicitations. In explaining why the contribution limitations at issue in *Buckley* “operate[d] in an area of the most fundamental First Amendment activities,” the Court stated that “[t]he First Amendment affords the broadest protection to such political expression in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”⁹⁰ The Court also stated in its opinion that “[d]emocracy depends on a well-informed electorate”⁹¹ and that “the central purpose of the Speech and Press Clauses [is] to assure a society in which ‘uninhibited, robust, and wide-open’ public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish.”⁹²

The accomplishment of these goals necessarily and consequently includes more than simple campaign speech, and, for that matter, discussion of legislation. As Alexander Meiklejohn put it:

[The First Amendment] protects the freedom of those activities of thought and communication by which we “govern.” . . . [V]oting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express [T]here are many forms of thought and expression

90. *Id.* at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

91. *Id.* at 49 n.55.

92. *Id.* at 93 n.127 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values.⁹³

Meiklejohn offers four areas which play a role in the operation of self-governance: "education," "philosophy and science," "literature and the arts," and "public discussions of public issues."⁹⁴ Considering contributions to organizations in light of *Schaumburg* and the theory of self-governance, a solid justification exists for extending *Buckley* to encompass the expenditure of money which serves to associate with and express support for a wide variety of views and agendas. Thus, the term political advocacy should arguably encompass social movements aimed at shaping our society.

Previous Supreme Court statements also support the proposition that political advocacy is broader than legislative or electoral advocacy alone. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,⁹⁵ the Court noted that the organization at issue engaged in political advocacy, describing it as "chartered as a nonprofit, educational organization whose purpose is to inform the general public about the 'gay movement' and 'to diminish the ageist, sexist and racist divisiveness existing in all communities regardless of sexual orientation.'"⁹⁶ The Court thus deemed activities as political advocacy which seemingly do not predominantly involve lobbying or electioneering, but instead focus on public education.

As even the court in *Al-Arian* conceded, the foreign aspects of the organizations and the contributions' destinations may play a role in the Executive's need to have greater control in matters of foreign relations.⁹⁷ This consideration, however, should not affect the standard of scrutiny applied to contributions made by those entitled to constitutional protection, but would certainly factor into the sufficiency of the governmental interest involved. Moreover, it is the paramount nature of the national security interest that brought each of the circuits

93. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-56.

94. *Id.* at 257.

95. 483 U.S. 522 (1987).

96. *Id.* at 564 n.24.

97. *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1343 n.41 (M.D. Fla. 2004).

dealing with the constitutionality of contribution prohibitions under § 2339B to find that, regardless of whether *Buckley* or *O'Brien* governed, the government's interest justified the infringement on First Amendment rights.

Even in the face of national security concerns, ever-pressing in each generation, the Constitution demands that the rights of contributors receive the proper treatment to ensure their protection. If, in the future, courts are challenged with evaluating contribution restrictions pertaining to a type of organization not so easily dismissible as a designated terrorist organization, their choice of test will likely take a more lime-lighted position. As no clear answer is outlined for circuit courts and precedent provides a shaky foundation, a close look at the organization's goals and functions may be helpful in determining who deserves *Buckley* protection. Moreover, information on the degree to which the organization separates functions of advocacy from other perhaps less-protected functions, and the freedom with which donors may contribute funds specifically to political advocacy functions to the exclusion of others may be probative. Regardless of the best approach, it is clear that where courts fall along the scale has been given inadequate attention which may have heavy consequences for the freedom to pursue discourse protected by the First Amendment. However weighty government's interests may be now and in the future, courts must take the time to carefully consider what should constitute valid speech that will aid in an individual's efforts to become an informed member of his or her enlightened society.

